

**Exhibit #5 - “7.13.23 Motion to Recuse Arbitrator Michael G. Berger”**

AMERICAN ARBITRATION ASSOCIATION

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AAA Case No: 01-16-001-7288:

FOX NEWS NETWORK, LLC., SUZANNE SCOTT,  
DIANNE BRANDI, IRENA BRIGANTI,  
WILLIAM SHINE, and THE ESTATE OF ROGER AILES

Claimants,

vs.

ANDREA K. TANTAROS,

Respondent.

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ANDREA K. TANTAROS,

Counter-Claimant,

vs.

FOX NEWS NETWORK, LLC., SUZANNE SCOTT,  
DIANNE BRANDI, IRENA BRIGANTI,  
WILLIAM SHINE, and THE ESTATE OF ROGER AILES

Counterclaim-Respondents.

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**MOTION TO RECUSE**

**FACTUAL BACKGROUND**

Ms. Tantaros was an employee of Fox News from 2010 through 2016. Ms. Tantaros also served as a political advisor to both Roger and Elizabeth Ailes, carrying out tasks and performing duties as a political consultant to several candidates and politicians chosen by Roger and Elizabeth Ailes and Roger Ailes' boss, Rupert Murdoch, Chairman of Fox Corporation, then-21<sup>st</sup> Century

Fox. During the course of her employment, Fox News talent and various executives of the company subjected her to a now well-known and well-established, pervasive culture of sexual harassment, incessant retaliation using their Media Relations Department, Legal Department, Black Room (an internal unit of Fox-hired contractors, private investigators, black-hat hackers, opposition researchers) and a hostile workplace rife with intimidation, discrimination, misogyny and a mandated sexual quid pro-quo that expected women like Ms. Tantaros to perform sexual acts and touching in exchange for career advancement.

Ms. Tantaros' formal complaints pre-dated any known or reported claims that surfaced in July of 2016, and were made beginning in 2014 both through herself and her entertainment lawyer orally and in writing. In point of fact, this litigation commenced well-before any woman publicly came forward at Fox News Channel, years after Ms. Tantaros commenced her well-documented complaints. These complaints were summarily ignored and the retaliation escalated in the form of decreased air-time, denial of professional opportunities and invitations, purposely placed hit-pieces and media smear articles, human and electronic surveillance into her personal computer, email, phone and other affairs on a constant basis. The repeated complaints were made directly to Counter-claimants now-CEO Suzanne Scott, ex-General Counsel Dianne Brandi, ex-President William Shine, Denise Collins of Fox News Human Resources and the late Roger Ailes. Several of her colleagues were witnesses to her claims, and victims of this toxic environment including former host Megyn Kelly. Ms. Kelly would later come forward with accusations against Ailes, Bill O'Reilly, Briganti and publicly stated that women at Fox lived in "fear of Roger" and "fear of his legal and PR teams"... and that coming forward was akin to "career suicide."

William Shine was fired in 2017 for the exact behavior outlined in Ms. Tantaros' complaints and her original legal Complaint filed in 2016. Specifically, *inter alia*, Roger Ailes, Fox News's

then-President, repeatedly asked Ms. Tantaros to “turn around so I can get a good look at you” (known at Fox News as “the twirl”), asked her to “come over here so I can give you a hug,” told her “I bet you look good in a bikini,” asked her about the sexual relationships of other Fox News employees, her sex life, and made other inappropriate comments of a sexual nature to Ms. Tantaros encouraging her to engage in sexual acts to rise through the ranks, curry favor with Ailes, Shine, Scott, Ailes’ secretary Judith “Judy” Laterza”, and other male talent and executives and be provided more advantageous treatment and on-air opportunities. Roger Ailes also used the likes of other talent like Kimberly Guilfoyle (and Ailes’ executive assistants) to encourage Ms. Tantaros and other on-air female personalities to perform sexual acts with Fox News talent, guests, executives and FOA (“Friends of Roger). Ms. Guilfoyle was terminated in 2018 for this exact behavior and exposing females at Fox News to lurid and explicit photos of male genitalia and other forms of harassment. (Ms. Guilfoyle’s assistant accepted a settlement in the amount of \$4 million (dollars) in exchange for her silence to protect Fox News). Because Ms. Tantaros rebuffed Mr. Ailes’s advances and refused to engage in inappropriate and sexual acts, Fox News and Mr. Ailes retaliated against her by removing her from a show that aired at a highly desirable time to a show airing at noon, among the lowest-rated time-slots, as she refused to comply. Fox continued to retaliate by breaching the agreed upon terms of her employment contract for nineteen (19) months, refusing to cure said breach even with notice from her counsel that required Fox provide her with an assistant, denying her speaking opportunities such as a Ted talk on her then-forthcoming book published by Fox’s sister company, Harper Collins, refusing to allow her to guest host other programs, appear on shows like The View as other female hosts and contributors had been granted because Mr. Ailes insisted she was “his star”, shot down requests for media profiles and articles on Ms. Tantaros’ career, spied on her personal life and all communications and interfered with other business opportunities that would greatly enrich, benefit and promote Ms. Tantaros. As Ms. Tantaros’s refusals continued and

following multiple complaints of sexual harassment, Fox News's retaliation of her only escalated. This heavy-handed uptick reached an apex following a February 19, 2016 meeting with Ms. Tantaros, Suzanne Scott and Human Resources when she made additional complaints of sexual harassment, retaliation and hostile treatment by several Fox executives, talent – including Bill O'Reilly – and others. During a March 13, 2016 meeting with her attorney, Dianne Brandi, outside counsel for Fox, Barry Asen (and partner and personal attorney for a newly AAA-appointed arbitrator in this action, Michael Berger), Mr. Asen verbally assaulted Ms. Tantaros about her forthcoming book, used sexually explicit and inappropriate language to describe his views on Ms. Tantaros. Ms. Brandi was forced to intercede, repeatedly insisting and assuring Ms. Tantaros and her attorney she was not in any breach of her employment contract. Just weeks prior, she had communicated to Ms. Tantaros' entertainment attorney how pleased Fox was with her on-air performance and ratings. On April 25, 2016 without prior notice, 24 hours before her book was set to launch on the morning program, Fox and Friends and she was to embark on her book tour. Fox News interfered by cancelling her media appearances to promote her book, and colluded with her publisher, Fox-owned Harper Collins, to not market, promote or assist her with promotion of her book, instructing bookstores to hide Ms. Tantaros' book in the "gay and women's literature section" to destroy her book's sales and success. The Fox PR Department began to place negative, coordinated reviews in allied media outlets, alter ratings, reviews and post negative feedback on sites like Amazon and her social media accounts. Fox News Network sent Ms. Tantaros an email to her personal email address stating, among other things, she was suspended from the air interminably for a concocted, pretextual smokescreen: allegedly not receiving prior approval for her book Tied Up in Knots (which she obtained orally and in writing through her own personal contacts with Roger Ailes, Dianne Brandi, and via her book agent, that she talked about for months prior on the air, promoted on her social media accounts closely monitored by Fox News and on which she obtained a glowing

quote from Fox and Friends host and then-secret paramour of Sean Hannity, Ainsley Earnhardt... approved by Brandi on February 19, 2016—the same day Ms. Tantaros met with Suzanne Scott and Human Resources). Additionally, the letter falsely alleged that she had manufactured and lied about her claims about sexual harassment, encouraging her to sleep with married men or men in power to which she refused, grossly inappropriate behavior, retaliation, a hostile work environment at Fox News Network. On May 11, 2016, while she was still employed, Fox News initiated this arbitration under the Employment Rules of the AAA, seeking a declaratory judgment and injunctive relief in the amount of \$75,000.00 (dollars) in connection with an alleged breach of contract for not obtaining permission for her book, in retaliation for her complaints.

On May 13, 2016 Fox News Network instructed their outside counsel to intimidate her into signing a seven-figure settlement with an illegally structured contract of adhesion in exchange for her eternal silence, renounced claims of sexual harassment sexual misconduct, retaliation and hostile workplace, and a public apology that would require her to lie stating she had violated the book guidelines of her employment contract, not a material breach, by publishing a book without Fox's knowledge. Ms. Tantaros rejected the contract.

On July 6, 2016, Fox host Gretchen Carlson would come forward to file a lawsuit against Roger Ailes for sexual harassment and retaliation following Fox's termination of Ms. Carlson for poor performance and lackluster ratings. Over two dozen women would subsequently come forward following Ms. Tantaros including female employees past and present with identical claims to Ms. Tantaros. On August 22, 2016, Ms. Tantaros filed employment discrimination and retaliation claims under New York State Executive Law ("NYSHRL") § 296(1)(a), (e) and New York City Human Rights Law ("NYCHRL"), N.Y. Code § 8-107 in New York Supreme Court. Fox News public attacked and wrongfully accused Ms. Tantaros of being a 'liar, an opportunist and a wannabe" victim of sexual and mental abuse through retaliation and their culture of

institutional brutality and sexual exploitation. They would issue a public statement through Dianne Brandi deceptively stating in their entire existence they had “never received any complaints of sexual harassment” or otherwise. Seven and-half long years later and following investigations by the Fox Shareholders into illegal payouts, pervasive harassment, retaliation, illegal spying (through hidden cameras placed in offices of Ms. Tantaros and others where they regularly disrobed) and a toxic workplace, Fox settled for \$92 million (dollars). In 2021, following a four-year investigation conducted by the New York Commission on Human Rights Fox was found guilty of fostering a culture of abuse, sexual harassment, retaliation, hostile workplace, terminally black-listing women from working in the media industry, placing smear pieces on females who came forward internally to complain and refused to comply, and spying on females by “deleting data and manipulating computer systems” and phone-hacking of women like Ms. Tantaros who chose to speak-out and seek relief from her supervisors. The NYCCHR not only corroborated all of Ms. Tantaros’ claims, they levied the largest fine in the organization’s history, putting the network on a three-year probation period and forbidding the network to use forced arbitration clauses in their employment contracts as a means of dispute resolution. Fox News fired Ms. Tantaros her on October 6, 2016 cutting off her salary. On March 9, 2017, Ms. Tantaros’s state court claims were compelled to arbitration, and she subsequently filed employment-related counterclaims in the above-referenced action, including sexual harassment, retaliation, hostile workplace and tortious interference claims under NYSHRL and NYCHRL. *See* (Answer to Amended Demand for Arbitration and Counterclaims.). Since the filing of her lawsuit, secret payouts to former Fox female employees would leak to various news outlets including the New York Times sparking a grand jury investigation into Fox News Network spearheaded by the U.S Attorney for New York’s Southern

District (in which she was a cooperating witness), multiple external investigations, a deluge of rolling lawsuits (and subsequent terminations) against Roger Ailes, Suzanne Scott, Dianne, Brandi, Bill Shine, Bill O'Reilly, Ed Henry, James Rosen, Eric Bolling, Tucker Carlson, Andrew Napolitano, and others. To date, Fox News has paid over \$200 million (dollars) to settle claims identical to Ms. Tantaros' claims that were made years before any accusation or knowledge of the aforementioned settlements were made public, making her the original whistleblower.

Fox has (Fox News Network just recently settled a lawsuit for hostile workplace claims made by a producer for fired host Tucker Carlson on June 30, 2023 in the amount of \$12 million (dollars).

Beyond its lies about an abhorrent, well-established habitual course of conduct that shielded predators and subjugated and punished female employees who would not comply in an illegal culture of sexual deviance, Fox News Network settled with Dominion Voting Systems for \$787 billion (dollars) for perpetuating lies about the 2020 Presidential Election, illustrating there is nothing too large or too small that Fox News would lie about and the manner, both civil and criminally, in which they'll go to conceal their grotesque misdeeds.

### **PROCEDURAL HISTORY**

Following years of discovery and the former AAA Tribunal's scheduling of depositions of all Parties (which have yet to occur), New York State passed C.P.L.R. 7515 in 2018 (later amending the law to include all forms of discrimination) in an effort to change policy policy disfavoring confidential arbitration and preventing forced arbitration of sexual harassment claims. Ms. Tantaros filed a Petition in New York State Supreme Court to have her claims heard in open court under the new law. The case was quickly removed to Federal Court in an obvious attempt by Fox News to cost money, delay and forum shop claiming the raised a federal question under the FAA. The Supreme Court has long-held that State Courts hold concurrent jurisdiction to



interpret the FAA, the District Court disagreed. After appeal before the Second Circuit U.S. Court of Appeals, the District Court remanded Ms. Tantaros' case back to arbitration.

In their Motion to Lift the Stay placed on this action during which time Ms. Tantaros, along with hundreds of other women and men, utilized their rights and tested the novel law's applicability.

In classic Fox News fashion, they attempt to malign Ms. Tantaros for pursuing her rights under changes in public policy disfavoring arbitration, rather than capitulate to the interests of a disgraced corporation devoid of credibility that publicly wraps itself laughably in the U.S. Constitution on a daily basis before its ever-shrinking audience weary of its incessant lies.

No victim should be shamed under the auspices of whiny motions bemoaning "delay" for a being a woman like Ms. Tantaros empowered to seek relief in the sunlight of open court given state and federal laws that continue to pass, making forced arbitration of sexual harassment illegal, rather than shrouded in the secrecy of an increasingly outdated and disparaged method for dispute resolution by state and federal U.S. lawmakers.

During the duration of the Stay of this arbitration, Michele Gomez, case manager for the action continued to send monthly invoices for hearings that have not been set, deposits for arbitrators on the three-person panel and requested status updates from this panel. On March 14, 2023 Fox News filed their Motion to Lift the Stay on this action. The Parties were not informed of the Arbitrator departures by Ms. Gomez until *two weeks later* upon request by Ms. Tantaros and formal request to see both the dates of their departure and reasons provided. Only then was the selection process to replace the two vacancies initiated. The AAA had a duty to inform all Parties of the vacancies **per the AAA's own rules** and fill their positions prior to any other communication or acceptance of a filing. Since August of 2022, status updates and costly financial invoices have been sent for panelists who no longer exist. The invoices inexplicably reflected the fees and deposits for the Arbitrators who were no longer serving. This lack of

transparency is unacceptable and has gone without explanation from the AAA.

Given the Parties needed to fill these vacancies, the AAA provided lists curated by their case manager, Ms. Gomez or commercial arbitrator options. The names listed lacked in diversity of gender, proactive of law (they were almost entirely all from corporate side, New York City-based firms. The AAA followed up with a second, far shorter list with additional options that were not only commercial arbitrators, but also more of the same pro-employer, overtly conflicted options. Given the Parties were not able to agree on mutually selected replacements for Ralph S. Berger and Paul Kehoe, the AAA informed the Parties it had selected Michael Berger and Loretta Gatswirth as replacements. Any objections were to be made in writing.

### **ARGUMENT**

In his official ADR biography and in his Disclosure, Michael Berger's history dictates he is overtly and deeply conflicted. He served as "Of Counsel" with the firm of Epstein, Becker and Green from 1987-1997 and concedes he served as personal counsel separately representing partners Ronald Green and Barry Asen in an individual capacity. He states he left the firm to move to his own office within the same building as Epstein, Becker and Green and maintained professional contact allegedly through 2020, pre-pandemic. As the ADR and the case manager (and her superior) should well-know prior to selection, Epstein Becker and Green has served, and continues to serve, as outside counsel for Fox News Network LLC for over two decades. Epstein, Becker and Green—and specifically Ronald Green and Barry Asen—not only filed the Demand initiating this arbitration on behalf of Fox on May 11, 2016, they conducted interviews with me regarding a Fox's pervasive climate of sexual harassment, retaliation and hostile workplace, but also spearheaded the "internal investigation" into Ms. Tantaros' formal complaints and were present during meetings at Fox News, Ms. Tantaros, her counsel, Dianne Brandi and Barry Asen,

in addition to Fox's Human Resources Department. It was Epstein, Becker and Green who attempted to foist a seven-figure settlement agreement upon me on May 13, 2016, which Ms. Tantaros refused to sign and turned over to the U.S. Attorney's Office for the Southern District of New York as it was illegally structured. This led to a grand jury investigation that unearthed evidence of multiple settlements made without the knowledge or consent of Fox News Network's Board, Shareholders or the Securities and Exchange Commission over the span of two decades and a Shareholder Derivative Complaint that settled in 2017 for \$92 million, as notated above. Settlements forced upon unsuspecting female talent like Ms. Tantaros were drafted by Michael Berger's firm, former law partners and former clients, Barry Asen and Ronald Green in conjunction with ex-General Counsel, Dianne Brandi, a party to this case who was terminated for this pattern of unlawful conduct. Additionally, Michael Berger discloses he served as co-counsel with Ms. Tantaros' first attorney, Judd Burstein, who was retained to represent her in a resolution with Fox News Network regarding her aforementioned, well-documented claims, in March of 2016, not move to arbitration or push for any unlawful settlement offer. Mr. Burstein has stated to Ms. Tantaros on numerous occasions both orally and in email communications that he is close personally and professionally with both Asen and Green and several other details that confirm his close ties to both men, their firm, Fox News Network and several key employees and talent, along them, Brian Lewis, former head of Media Relations. Mr. Lewis was a client of Mr. Burstein after he allegedly brought claims against the network and settled for \$9 million. Mr. Green and Mr. Asen were representing Fox News Network and Roger Ailes in that matter. Additionally, Mr. Berger states that he is aware that Ronald Green, Barry Asen and Judd Burstein are listed on the witness list for this specific action. **Mr. Berger must be recused of his appointment as arbitrator.**

The ADR was alerted to these facts in a written communication to Ms. Gomez and Ms. Santo on Wednesday June 7<sup>th</sup>, 2023 citing that this choice “not only underscores the organization’s complete lack of careful and effective vetting, but also illustrate a total disregard for overt conflicts of interest that go well-beyond problematic.”

The American Arbitration Association’s Rules clearly state that

“there must be complete faith in arbitration impartiality.” Per both the ADR’s Commercial and Employment Rules R.19 Disqualification and 12. Qualifications, disqualification exist when “facts give rise to justifiable doubt of an arbitrator’s impartiality or independent bias”. Section “R.19 i” further states disqualification is appropriate when there is a question of “partiality or or lack of independence.” Further, in section 12: an arbitrator must have “no relation to the underlying dispute, or to the parties or their counsel that could create the appearance of bias.”

Any local, state, or federal judge would be forced to recuse himself / herself from a case to which such blatant and controversial ties exist that taint his ability to serve in an independent, impartial capacity. The Due Process clauses of the U.S Constitution require recusal “where there is otherwise a strong possibility that the judge’s decision will be biased.” No judge could oversee a case where he had been a partner to a firm representing a party in the past (and currently), represented parties’ lawyers personally, co-counseled with the opposing party’s counsel, and subsequent those same individuals are listed on a witness list for trial / hearings the proposed arbitrator is expected to fairly oversee.

### **CONCLUSION**

The Fox News Parties have yet to address or defend the conflicts and appointment of Michael Berger to arbitrator in either their June 12, 2023 letter or their July 6, 2023 communication. In their latest filing, the Fox Parties continue to dodge addressing the issue, rather choosing to avoid the matter completely by bemoaning delay of of litigation that has clearly been unnecessarily protracted for both sides, but refrained from justifying Mr. Berger given his obvious ties to

their corporation, counsel and individuals who are directly part of this action and that work to Fox News Network's benefit. No party, no matter how powerful, should be bullied by both opposing parties and an impartial dispute resolution forum like the AAA in favor of speed. The affirmation of Michael Berger's service as arbitrator is highly inappropriate, constitutes a violation of the rules, and is both unconscionable and unacceptable. The AAA must reconsider and rescind his affirmation and consider an alternative and far more appropriate candidate. For the forgoing reasons, Andrea K. Tantaros humbly requests that newly-appointed Arbitrator Berger and the AAA Recuse Mr. Berger of his duties in favor of appointing a non-conflicted, more suitable, independent replacement.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Andrea K. Tantaros', is written over a horizontal line.

Andrea K. Tantaros, *pro se*

Respondent / Counter-claimant

Date: July 13, 2023

**CERTIFICATE OF SERVICE**

I, Andrea K. Tantaros, certify that a true and correct copy of the foregoing was served on this day, July 13, 2023, on counsel for Respondents / Claimants Fox News Network, LLC., Suzanne Scott, Irena Briganti, Dianne Brandi, William Shine and The Estate of Roger Ailes via mail and electronic means at their current and last known addresses provided.



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